United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1422

To be argued by
BARBARA ANN SHORE

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THOMAS PALERMO :

Petitioner-Appellant, :

-against- :

HON. LEON VINCENT, :

Respondent-Appellee :

----------X

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

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On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York, dated February 14, 1974 (Dooling, D.J.) dismissing petitioner-appellant's petition for a writ of habeas corpus. A certificate of probable cause was granted by the District Court on February 28, 1974.

Questions Presented

1. Whether remarks in the prosecutor's summation deprived appellant of his right to a fair trial.

2. Whether under the circumstances of this case gagging the appellant in the presence of a jury was a constitutional means of controlling the appellant.

Statement of Facts

The Trial

Appellant was indicted on two counts each of robbery and grand larceny, on March 25, 1968, and was tried with his co-defendant Sheldon Saltzman in Richmond County Supreme Court. The trial was held from February 17 to February 26, 1969. Prior to the trial a hearing was held on the question of the admissibility of the in-court identification. The trial judge held that the two eyewitnesses had sufficient time to observe the perpetrators to identify them independently of any show-up.

The trial began on February 17, 1969. The prosecutor first called Mrs. Bonopane and Mrs. Ariosta, the widowed sisters who were the victims of the robbery that occurred on January 28, 1968. Both testified that on January 27, 1968 they had received a phone call from a man identifying himself as Mr. Persito, and expressing interest in buying some of their property (Tr. 295, 437-440). On January 28, he called again and arranged to meet them at their home (Tr. 297-298).

At 2:30 the man calling himself Persito and another man arrived at the sisters' home. After being admitted, the men looked at the tax bills for the property they were interested in (Tr. 303, 310, 312, 442-444). Then the men pulled guns out, and told the women that it was a stick-up and that they wanted money (Tr. 313, 445). While the man calling himself Persito held the women at gunpoint in the living room, the other man, identified at trial as the defendant Palermo, ransacked the house (Tr. 315, 316, 440, 445). Before leaving the house they manacled the women to a wrought iron balustrade and took with them a quantity of jewelry, $1850 in cash, $400 in coins (Tr. 338-340, 359-380, 449-450, 475-487).

In court, Mrs. Bonopane and Mrs. Ariosta both identified appellant Palermo as the man who ransacked their house (Tr. 309, 440). Their identification was strengthened by the fact that the perpetrators had spent an hour and ten minutes in the house. The women had a chance to see the men in bright afternoon daylight showing through an 11 foot picture window (Tr. 315-316, 463). Moreover, the witnesses stated that at one time the appellant held a gun to Mrs. Bonopane while she answered the telephone (Tr. 323-332, 455). The sisters also testified on

cross-examination that several hours after the robbery, they separately picked a photograph of Palermo from 500 photos (Tr. 391-397, 544-545).

Detectives Corbett and McAloon corroborated the sisters' identification of appellant from photographs (Tr. 598, 601-606, 697-701).

Appellant's alibi defense was brought to the attention of the court after the "Wade" hearing had been held. Although counsel had not complied with the statutory requirements for informing the prosecution of a proposed alibi defense, the court allowed the alibi defense in the interest of justice (Tr. 253-270).

In support of appellant's alibi defense Leonard Macaluso, a Motor Vehicle Enforcement Officer for New Jersey, testified on behalf of Palermo. (Tr. 742). He stated that, although his primary duties were in the area of licensing, he had the power to give summonses for traffic violations. (Tr. 762-763). He claimed that on January 28, 1968, though it was a Sunday and he was off-duty, he voluntarily donned his

uniform and patrolled from about 11 A.M. to 5:30 P.M., merely because he liked his job (Tr. 743-744, 757-758, 764, 788). He testified that he stopped Palermo that afternoon and called Albany Motor Vehicle Bureau, with his own funds for which he was not reimbursed, to determine if Palermo's license had been revoked. (Tr. 749, 771, 775). New York had no record of a revocation, so Macaluso merely issued a summons to Palermo for driving without a license (Tr. 772, 775). This summons was marked with the time of 2:15 P.M. (Tr. 775). Macaluso further testified that Palermo became so abusive that he considered arresting him but instead issued to him another ticket at 2:35 P.M. for speeding (Tr. 780). Macaluso acknowledged that he was in court in Lodi on February 8, 1968, the return date for Palermo's summonses, attending to other summonses returnable then, and that Palermo did not appear in court then. (Tr. 769, 799, 804). Allegedly, through an oversight, Macaluso did not file these two summonses with the court or with his department until February 14, 1969 or three days before the trial.

On cross-examination, it also was revealed that Macaluso had not listed these two summonses on the monthly recapitulation which he filed with his department at the end of January, 1968 (Tr. 794, 851, 897-901). And, though the summonses

contained in his book were numbered consecutively and designed to be issued that way, the tickets allegedly issued to Palermo on January 28, 1968 followed a ticket issued by Macaluso in March, 1968 (Tr. 792, 794, 903).

Jerome Rackover, a jewelry manufacturer and diamond merchant, testified that he had been a friend of Palermo's for about 10 years and that, one Sunday in January, 1968, Palermo asked him to drive to Scranton, Pennsylvania so he could visit an aunt there (Tr. 956-958). He said that, since he didn't feel well, he slept in the back of the car while Palermo drove. (Tr. 958). He testified that he was awakened by an argument between Palermo and Macaluso and that they were detained in New Jersey for a period of time (Tr. 959-960, 961). After the second summons was issued, Rackover drove them back to New York (Tr. 960). He did not receive a summons for permitting an unlicensed operator to drive his car (Tr. 1006).

Sheldon Saltzman took the stand denying any participation in the robbery (Tr. 1052-1109). Alfred Bonvicino testified to Sheldon Saltzman's good character (Tr. 1109-1113).

After the testimony, the attorneys for the defendants made their summations. Mr. Evseroff, attorney for the petitioner, put heavy emphasis on the fact that the case was one of identification and that the witnesses had seen a picture of the petitioner in the M.O. file at the police department.* He suggested that their identification was based on the photograph rather than independent observation (Tr. 1126, 1132). He then stressed the reliability of the alibi witnesses, saying that Macaluso was a police officer and:

> "If you can find any one reason in this record for Macaluso having come in here, a Motor Vehicle officer in the State of New Jersey committing willful perjury for Palermo, you convict Palermo. You examine the record in this case." (Tr. 1152-1153).

He concluded that the robbery had been an inside job, done by someone who knew the neighborhood where the sisters lived.

The prosecutor's summation was in part answer to the defense summation. Contending that there may have been someone local involved, he stated that the job was professionally planned and carried out (Tr. 1191, 1197). His second comment on the professional nature of the crime was based upon the

*A M.O. File or modus operandi file is a compilation of pictures of previous asrrested felons, organized according to the crime previously committed.

fact that the perpetrators wore gloves (Tr. 1193). The three other comments of professionalism related to an alibi which alleged documentation of appellant's whereabouts at the time of the robbery (Tr. 1208, 1209, 1210).

The prosecutor made other remarks attacking the appellant's alibi witness which the court instructed the jury were opinion, not testimony.

The jury returned a verdict of guilty on June 26, 1969. On June 27, 1969, appellant was sentenced to a maximum term of 25 years on the robbery conviction and to a concurrent term of 0 to 7 years on the grand larceny conviction.

Prior Proceedings

On May 24, 1971, the Appellate Division, Second Department unanimously affirmed the judgment of conviction, without opinion. People v. Palermo, 36 A D 2d 1024 (2d Dept. 1971). The Court of Appeals affirmed the judgment of conviction on April 25, 1973. People v. Palermo, 32 N Y 2d 222 (1973).

The appellant applied for a writ of habeas corpus in the United States District Court for the Eastern District (Dooling, J.). He claimed that his constitutional rights were

violated because 1) there was insufficient evidence to prove his guilt beyond a reasonable doubt, 2) the in court identification by the two robbery victims was unconstitutional, 3) the prosecutor's summation prejudiced the jury, and 4) the trial judge acted arbitrarily and unconstitutionally in gagging the appellant. Respondent-appellee filed answering papers on July 17, 1973. By order dated September 17, 1973 the District Court appointed Lawrence Hochheiser as counsel. Then James O. Druker, as counsel, filed a memorandum of law on December 8, 1973 and respondent filed a reply memorandum of law on or about January 16, 1974.

The District Court denied the writ by decision-order dated February 14, 1974. The court reviewed the trial proceedings and held that under the special circumstances of the case, the prosecutor's summation was not "a transgression of fair trial standards of constitutional dimensions".

Concerning the gagging claim, the court reviewed the record, noted that the appellant was listening to the District Attorney's summation attacking the testimony of his alibi witnesses, of which testimony "it must be said that few could believe it, intrinsic incredibility is written all over it". A-98.

There was an outburst and the trial judge ordered gagging. The court held "when the outburst occurred, the trial was nearing its end, the summation by the People was critically important to the appellant and his co-defendant, and the trial judge was right to take drastic action". (A-19).

ARGUMENT

POINT I

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE PROSECUTION'S SUMMATION DID NOT DENY APPELLANT DUE PROCESS.

A. THE DISTRICT COURT USED THE PROPER STANDARD IN HOLDING THAT THE PROSECUTOR'S SUMMATION DID NOT DENY APPELLANT DUE PROCESS.

Appellant in his attack upon certain statements by the prosecutor claimed by him to be improper relies upon United States v. Pepe, 247 F. 2d 838 (1957); United States v. Drummond, 481 F. 2d 62 (1973) and United States v. Gonzalez, 488 F. 2d 833, slip. op. p. 625 (12/6/73).* The cases cited, however, are appeals from federal court convictions which are subject to a different standard of analysis than the case at bar, a collateral attack upon a state conviction.

*People v. Figueroa, 38 A D 2d 595 (2d Dept. 1971) also cited, may be distinguished from the other cases since the prosecutor there personally vouched for the truthfulness of the witnesses and was in effect an unsworn witness.

The proper standard to be applied in considering whether prosecutorial summations in state trials violated due process requirements was set forth in Buchalter v. U.S., 319 U.S. 427, 431 (1943):

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land' ... But the amendment does not draw to itself the provisions of state constitutions or state laws . . ." Buchalter v. New York, 319 U.S. 427, 429-30 (1942).
>
> ". . .The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioner now complains. This does not raise a due process question."
>
> "As we have recently said, 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality (quoting Adams v. McCann, 317 U.S. 269, 281)." Buchalter v. New York, 319 U.S. 427 (1942).

This standard has been reaffirmed in a recent United States Supreme Court decision. Donnelly v. DeChristoforo, 42 U.S.L.W. 5682 (U.S. May 13, 1974).

In that case, the respondent had been convicted of first degree murder after a trial by jury in a state court. He appealed his conviction without success and then sought habeas corpus relief in the federal court. He alleged that the prosecutor's summation included remarks indicating his personal belief in the respondent's guilt and also implying that the respondent had unsuccessfully plea-bargained before going to trial. Such remarks allegedly prejudiced the jury.

Reversing the Court of Appeals which had held that remarks implying prior plea bargaining deprived the respondent of a fair trial,* the court held that federal review of state trials is narrowly defined:

> "The Court of Appeals in this case noted, as petitioner urged, that its review was 'the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court.' We regard this observation as important for not every trial error or infirmity which might call for application of a supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.' Lisenba v. California, 314 U.S. 219, 236 (1941). We stated only this Term in Cupp v. Naughten, ___ U.S. ___ (1973), when reviewing an instruction given in a state court:

*The Court of Appeals held that the prosecutor's personal opinion, while improper, was not sufficient to violate due process. 473 F. 2d 1236, 1238 (1st Cir. 1973).

> 'Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."
>
> 42 U.S.L.W. at 4684

Looking at the context of the trial, the court noted that the prosecutor's remark occurred at the end of an extended trial. Furthermore, there were curative instructions by the trial judge.

> "We countenance no retreat from that proposition [that a state criminal conviction based on knowing use of false evidence is against the 14th Amendment] in observing that it falls far short of embracing the prosecutor's remark in this case. The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.

> While these general observations in no way justify prosecutorial misconduct, they do suggest a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."
>
> 42 U.S.L.W. at 4685

In this circuit, the standard of fundamental fairness has been consistently followed. In U.S. ex rel. Castillo v. Fay, 350 F. 2d 400 (2d Cir. 1965) this Court affirmed the lower court's denial of a petition for a writ of habeas corpus. In denying the petition, the court considered the fact that the summation of the prosecutor was unfair and distorted the issues in the case. However, the court noted:

> "Conduct of state prosecutors which it was contended was unfair and prejudicial has consistently been held on collateral attack in the federal courts to fall short of constituting a lack of due process." at 401.

See also U.S. ex rel. Garcia v. Follette, 417 F. 2d 709 (2d Cir. 1969); U.S. ex rel. Colon v. Follette, 366 F. 2d 775 (2d Cir. 1966). Contrast, U.S. ex rel. Haynes v. McKendrick, 350 F. Supp. 990 (1972), 481 F. 2d 162 (2d Cir. 1973)(holding that although a prosecutor's racial remarks prejudiced the jury, "the prejudicial non-racial comments did not create, as a demonstrable reality, such essential unfairness at petitioner's trial that his conviction must be reversed on federal constitutional grounds," at 997).

In view of the well-established standard that the petitioner must show "as a demonstrable reality" that the prosecutor's remarks were so prejudicial as to deprive him of a fair trial," it is clear from the record that appellant's constitutional right to a fundamentally fair trial was not violated.

B. ASSUMING ARGUENDO THAT THE PROSECUTOR'S REMARKS WERE IMPROPER, NONETHELESS, THEY WERE MERELY TRIAL ERROR AND DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL.

The prosecutor's summation came at the end of a week long trial, and was "notably billed in advance as his opinion." Donnelly v. DeChristoforo, supra. His remarks about the petitioner's alibi witnesses were in response to defense counsel's statement that petitioner's alibi witnesses had no reason to lie. (Tr. 1152-53). In response to defense counsel, the prosecutor suggested other possible reasons for testimony. Such opinions were followed by curative instructions by the trial judge (A 45-46, A 53-55).

The trial court said "anything said by counsel as to the testimony given by any witness if it does not jibe or agree with your recollections, you may disregard what counsel has stated." (A-53).

The prosecutor's remarks about professionalism can refer to the professionalism of the job. Assuming the remarks did allude to former crimes of the appellant, nonetheless, they did not prejudice the case. It is noteworthy that defense counsel did not object to the remarks. Perhaps, the reason was that defense had opened up the question of the appellant's prior record earlier in the case. In attacking the identification made by Mrs. Bonopane and Mrs. Ariosta, it was Mr. Evseroff who brought out the fact that they had seen the picture of appellant in the M.O. File (Tr. 595-598). In fact, the trial judge cautioned defense counsel about asking what a M.O. file was (Tr. 596). In addition, Sheldon Saltzman testified that he had first met the appellant at a previous court appearance (Tr. 1058, 1061). Such testimony was properly struck by Judge Kern. In this context, the effect of the prosecutor's remarks appears negligible.

C. ASSUMING ARGUENDO THAT THE PROSECUTOR'S REMARKS WERE IMPROPER, NONETHELESS THEY WERE HARMLESS ERROR BECAUSE OF THE OVERWHELMING EVIDENCE AGAINST THE APPELLANT.

Appellant must show "as a demonstrable reality" that the remarks of the prosecutor deprived him of due process.

*People v. Williams, 39 A D 2d 970 (2d Dept. 1972); People v. Meckler, 13 N Y 2d 168 (1963) were state reversals of trials where the prosecutor implied former crimes and are inapplicable in this federal review of a state trial.

Buchalter v. New York, supra, Donnelly v. DeChristoforo, supra, United States ex rel. Castillo v. Fay, supra. Petitioner fails to show such prejudice. Any improper remarks the prosecutor made that might be considered constitutional errors, are also "in the setting of a particular case ... so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. Chapman v. California, 386 U.S. 18, 22 (1967); Harrington v. California, 395 U.S. 250, 251 (1968). Haberstroh v. Montanye, 493 F. 2d 483 (2d Cir. 1974).

Indeed the record shows overwhelming evidence against the petitioner. The State presented two eyewitnesses to the crime who had an opportunity to observe the petitioner for a period of over an hour. Each witness was able to pick out the petitioner from a file of 500 photographs. From the record, it appears that both witnesses were steady, reliable and credible.

In contrast, appellant's witnesses presented an incredible alibi. Macaluso testified that he just happened to ticket the appellant at the time of the crime, although Sunday was his day off and he did not bother to file the ticket. Rackover just happened to lend a car to the petitioner on the very same Sunday. The testimony was replete with incredible coincidences.

Thus, the jury had ample reason for finding the appellant guilty beyond a reasonable doubt. The prosecutor's summation did not alter the evidence. His comments, carefully noted to be opinion, did not violate the appellant's right to a fair trial, and were harmless beyond a reasonable doubt.

POINT II

THE TRIAL JUDGE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY TEMPORARILY GAGGING HIM.

Appellant claims that gagging him was improper. As set forth in the transcript the episode started when defendant was loudly conferring with his counsel, during the prosecutor's summation. The following colloquy occurred:

> "(Defendant Palermo confers with Mr. Evseroff in audible tone.)
>
> "THE COURT: Just a moment, please. Now, there must be absolute silence at the counsel table.
>
> "DEFENDANT PALERMO: I can't talk to my lawyer? He is afraid of me here, I can't talk to my lawyer. I have to stand here and watch myself be framed?
>
> "THE COURT: You will be bound and gagged if you continue. Now you be quiet.
>
> "DEFENDANT PALERMO: I don't want to sit here and be framed.
>
> "THE COURT: You will be bound and gagged on one more outburst, Mister, one more.

"DEFENDANT PALERMO: You didn't give me a fair trial throughout the whole thing.

"THE COURT: Get a gag, will you please?

"DEFENDANT PALERMO: And you were a graft taker as a lawyer.

"THE COURT: Get a gag, please.

"DEFENDANT PALERMO: Get anything you want. I can't get a fair trial. You don't give my attorney half a chance.

THE COURT: Mr. Foreman, Gentlemen of the Jury, please pay no attention.

"DEFENDANT PALERMO: Pay attention to everything that's prejudicial. You wouldn't even let me approach the bench when I wanted to talk to you.

"THE COURT: Gag the defendant.

"MR. EVSEROFF: If your Honor please, I respectfully except.

"THE COURT: You have an exception.

"(Accordingly, Defendant Palermo is gagged).

"THE COURT: Now, I will remove that gag if he promises to be absolutely quiet. Counselor, it is your duty to ask him if he will be quiet, or does he prefer to remain gagged.

"(Mr. Evseroff confers with Defendant Palermo).

"THE COURT: Is he going to continue his outbursts, or will he be quiet?

"MR. EVSEROFF: If your Honor please, I respectfully object to this.

"THE COURT: You had your objection and your objection is overruled, Mr. Evseroff.

"MR. EVSEROFF: If your Honor please, I respectfully object to your Honor yelling at me.

"THE COURT: You have an exception.

"MR. EVSEROFF: Respectfully except.

"THE COURT: Now, Mr. Evseroff --

"MR. EVSEROFF: If your Honor please, I have another application. At this time I respectfully move for a withdrawal of a Juror.

"THE COURT: Motion is denied.

"MR. EVSEROFF: Respectfully except.

"THE COURT: Mr. Evseroff.

"MR. EVSEROFF: Yes, your Honor.

"THE COURT: Will you ask your client if he will be quiet and permit these proceedings to continue, or does he intend to make gratuitous statements?

"(Mr. Evseroff confers with Defendant Palermo.

"MR. EVSEROFF: He says, 'I'll be quiet', Judge.

"THE COURT: All right. Please continue, Mr. DiIorio.

"(Gag is removed from Defendant Palermo)." (T 1219-1222)(A 49-52)

As can be seen from the record, Judge Kern gagged the appellant only after warning him several times that such an action would be necessary. This action was clearly within the appropriate discretion of the judge.

In Illinois v. Allen, 397 U.S. 337 (1970) the Court held:

> "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle and obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

Appellant's appeal was based in part on the fact that he was gagged. Citing Illinois v. Allen, the New York Court of Appeals held that the gagging was proper:

> "In view of the warning given the defendant, the short duration of the gagging and the prompt removal of the

> gag upon the defendant's concession to observe reasonable and responsible court procedures, the trial court did not abuse its discretion in the method used in restoring order to the courtroom". People v. Palermo, 32 N.Y. at 222, 225, 226 (1973).

The court went on to note that the appellant was able to confer with his counsel and the jury saw why he was being restraining.

Thus, the trial court acted properly in expeditiously quieting the appellant so that the trial could proceed.

CONCLUSION

THE ORDER BELOW SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
June 13, 1974

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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THOMAS PALERMO :

Petitioner-Appellant, :

-against- :

HON. LEON VINCENT, :

Respondent-Appellee. :

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ARTHUR PAGANINI being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and reside at 79 Elks Rd Elmhurst N.Y

2. On the 13th day of June, 1974 I served the annexed Brief in the above entitled action on James O. Druker, counsel for appellant herein, located at 600 Madison Avenue, New York, New York.

Arthur Paganini

Sworn to before me this
13th day of June, 1974

Barbara Ann Shore
Assistant Attorney General
of the State of New York